No. 790

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IN THE

Supreme Court of the United States

October Term 1940

JOHN T. WALKER, MATILDA W. CONSTABLE, JAMES K. MERSEBERG, MALIA K. BLAISDELL, IDA LEE KWAI, WILLIAM K. MERSEBERG, HELEN P. TAM, MADELINE SAKAI, DELMAS L. JOY, BARNEY K. JOY, MAISIE K. DOANE, COULSON C. JOY, CUMMINS S. JOY, ELIZABETH P. J. GOEAS, FRANCIS B. JOY, Guardian of Thelma H. Joy, Wesley J. Joy, and Elaine K. Joy, minors, JOHN K. CLARKE, Guardian of Nellie Aipia, a minor, JOHN A. CUMMINS, THOMAS P. CUMMINS, RAPLEE K. CUMMINS, MOSELEY K. CUMMINS, WOOD K. CUMMINS and BRICKWOOD K. CUMMINS,

Petitioners,

vs.

RAY J. O'BRIEN and HAWAIIAN TRUST COMPANY, LIMITED, Trustees of the Trust Estate of John A. and Kahalewai Cummins under Deed of Trust Dated October 1, 1896, and MARGARET MAMO CLARK,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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vs.

RAY J. O'BRIEN and HAWAIIAN TRUST COMPANY, LIMITED, Trustees of the Trust Estate of John A. and Kahalewai Cummins under Deed of Trust Dated October 1, 1896, and MARGARET MAMO CLARK,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable
The Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the decree of the United States Circuit

Court of Appeals for the Ninth Circuit made in the above entitled cause on December 3, 1940 (R. 235), which affirmed the decree of the Supreme Court of Hawaii entered on February 15, 1940 (R. 184).

SUMMARY STATEMENT OF THE MATTER INVOLVED

John A. Cummins, a resident of Honolulu, Hawaii, in 1896 conveyed certain real estate to a trustee, upon trust to manage the same and to pay the net income to his wife and to himself for life, and after their death to his four children for life, and upon the death of the last surviving child the trust estate should be distributed to "the lawful issue of the children aforesaid then surviving, such issue to take by right of representation" (R. 37).

John A. Cummins died in 1913, his wife having predeceased him. Their last surviving child died in 1937 (R. 211).

Three of the children named in the deed left lawful issue them surviving, some of whom are the petitioners herein. The fourth child named in the deed died without leaving a child of her own, but in 1914 she had adopted a daughter whose name is Margaret Mamo Clark, one of the respondents herein.

At the date of the execution of the trust deed (1896) no children had been adopted into the family of John A. Cummins (R. 211). Moreover, the common law on the subject of adoption was unaffected by legislation in Hawaii until 1905 when adopted children were made heirs of the adoptive parents.

Upon the death of the last surviving child the present trustees filed their final account and asked the instruc-

tions of the court as to whom the principal of the trust estate should be distributed as the issue of the four children of the settlor, and whether an adopted child of one of the settlor's children was "lawful issue" under the trust instrument (R. 2).

Respondent Margaret Mamo Clark, the adopted child of one of the settlor's four children, claimed that she is "lawful issue" of her adoptive mother and hence is entitled to receive one-fourth of the trust estate. The Supreme Court of Hawaii sustained her contention.

The issue of the three children of John A. Cummins other than his daughter May K. Clark appealed to the Circuit Court of Appeals for the Ninth Circuit, which on December 3, 1940, entered a decree affirming the decree of the Supreme Court of Hawaii (R. 235).

OPINIONS BELOW

Opinion of the trial court (unreported) dated May 20, 1938 (R. 79).

Opinion of the Supreme Court of Hawaii dated August 11, 1939, 35 Haw. 105 (R. 123).

Opinion of the Circuit Court of Appeals dated December 3, 1940, 115 Fed. (2d) ———— (R. 230).

JURISDICTION

The decision of the Court of Appeals was rendered on December 3, 1940, and the mandate has been stayed pending the filing and disposition by this court of this petition (R. 236).

The jurisdiction of this court is invoked under Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U.S.C., Title 28, Section 347).

QUESTION PRESENTED

Is Respondent Margaret Mamo Clark, the adopted daughter of May K. Clark, lawful issue of her adoptive mother within the meaning and intent of the deed of John A. Cummins and hence entitled to one-fourth of the trust estate?

REASONS FOR ALLOWANCE OF WRIT

This cause involves the construction of a deed of trust executed in 1896 in which the settlor, a resident of Hawaii, made an irrevocable trust of his property in favor of his wife and himself for life, his children for life, and upon the death of the last surviving child directed that the corpus be distributed "to the lawful issue of the children aforesaid." The settlor died in 1913. His wife predeceased him. Their last surviving child died in 1937. Three of their children named in the deed of trust left lawful issue them surviving. The fourth died without leaving a child of her own, but in 1914 had adopted a daughter, Margaret Mamo Clark.

The question is whether or not an adopted child of one of the settlor's children is "lawful issue" within the meaning of the trust deed. The Supreme Court of Hawaii, by a divided court,[1] answered this question in the affirmative.

The overwhelming weight of authority is to the effec

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[1] Circuit Court Judges Le Baron and Brooks sitting in place of two Justices of the Supreme Court disqualified. Chief Justice Coke dissenting.

that the term "lawful issue" in a written instrument means descendants of the blood. Prior decisions of the Supreme Court of Hawaii have recognized that the primary meaning of these words is descendants of the blood. (*Rooke v. Queen's Hospital,* 12 Haw. 375, 396, et seq.)

The rule that an adopted child is not "issue" of its adoptive parents within the meaning of a deed or will where, as here, the donor was a stranger to the adoption, has been departed from only in two or three isolated cases which were decided in jurisdictions wherein there was in force, when the deed or will was made, a statute making adopted children heirs of the adoptive parents, but there is no decision anywhere in the common law world that makes such a departure where no such statute was in effect.

The Circuit Court of Appeals, without approving or even examining the reasoning of the Hawaiian Court, affirmed the decree of that court upon the ground that the conclusion of the Hawaiian court was "not manifestly erroneous." No attempt was made by the court below to consider or analyze the character or degree of the error committed by the Hawaiian court. The conclusion of affirmance was arrived at in supposed obedience to the decision of this court in *Waialua v. Christian,* 305 U. S. 91. This action by the lower court has deprived petitioners of any substantial review in that court which is accorded them by Section 128 of the Judicial Code as amended.

The opinion below proceeds upon the basis that so long as the court announces its allegiance to the familiar rule (that the judgment of a Territorial court will not be dis-

turbed in the absence of manifest error) the task of the circuit court of appeals is done.

We believe that where the Hawaiian court had made a clear departure from ordinary legal principles and the case is before the circuit court of appeals for review, it is the duty of that court to reverse the Hawaiian court. Nothing in the decision of this court in *Waialua v. Christian* is contrary to that view. The inherent difficulty in applying the standard laid down by this court cannot sanction the lower court's refusal to grapple with the problem presented.

If the decision below is to stand, no litigant in the Territory of Hawaii will ever be able to accurately judge his likelihood in getting a review in the circuit court of appeals from a decision of the Hawaiian court, no matter how erroneous the decision may be. In effect this decision makes all decisions of the Hawaiian court (whether manifestly erroneous or not) final. If by the mere statement, without analysis, that the decision of the Hawaiian court is not manifestly erroneous, the duties of the circuit court of appeals imposed by the Judicial Code are discharged, then that section of the Act is in effect repealed.

The words "lawful issue" in a deed or will have had an accepted meaning by courts and lawyers from the earliest times. They are words of art. Many trusts and wills have been drawn in reliance upon their settled meaning. To give those words a meaning different from that universally accepted, and upon which men have acted for generations, is manifestly erroneous.

The Court of Appeals in its opinion gives no clue to what standards, if any, are to be applied in determining when error is sufficiently bad to warrant a reversal. Diffi-

cult as the process of formularization is, the rule can only be given content by the impact of adjudicated cases in which the reasons for inclusion or exclusion are made known. The decision below, by making no effort to analyze the character or degree of error committed by the Hawaiian court, leaves litigants in complete darkness as to whether or not that court will ever reverse the decree of the Hawaiian court. This, we submit, was never intended by this court in *Waialua v. Christian,* 305 U. S. 91. Hence this court in the exercise of its supervisory jurisdiction should entertain this cause in the interest of clarifying the legal order of the whole Territory of Hawaii.

The reasons for allowance of the writ may be summarized as follows:

(1) The result reached by the Hawaiian court, unsupported by any decided case involving similar facts, constituted a clear departure from ordinary legal principles, and it became the duty of the court below to examine the cause on its merits and to reverse the decree appealed from;

(2) The action of the court below in affirming the decree of the Hawaiian court without an examination of the reasoning of that court virtually repeals Section 128 of the Judicial Code as amended, thus leaving litigants in doubt as to whether or not any right of review of the decrees of the Supreme Court of Hawaii exists;

(3) The court below misinterpreted the rule laid down by this court in *Waialua v. Christian,* 305 U. S. 91, in construing it to require a blind affirmance of the Hawaiian court without the necessity of any examination into its reasoning or the kind or degree of error committed by the Hawaiian court;

(4) The decision of the court below gives no inkling as to what standards, if any, are to be applied in determining what is "manifest error" by the Hawaiian court;

(5) This court, by granting the writ in this cause, can give some content to the rule which the court below thought it was following. A review of this cause by this court will serve to clarify the jurisprudence of the entire Territory and the duties of the Circuit Court of Appeals in reviewing decisions of the Hawaiian court, which the opinion below leaves in chaos.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify and to send to this court for its review and determination a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 9533, John T. Walker et al, Appellants, v. Ray J. O'Brien, et al, Appellees," and that the decree of said court be reversed by this court and for such further relief as to this court may seem proper.

DATED: Honolulu, Hawaii, February 6, 1941.

A. G. M. ROBERTSON,
Counsel for Petitioner

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

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Respondents.

Brief in Support of Petition for Writ of Certiorari

The petition contains a statement of the case and of the grounds of jurisdiction, and references to the opinions of the courts below.

ERRORS TO BE URGED

The Circuit Court of Appeals erred in:

1. Holding that the decree of the Supreme Court of Hawaii was not manifestly erroneous.

2. Holding that Margaret Mamo Clark, the adopted daughter of May K. Clark, is "lawful issue" of her adoptive mother within the meaning and intent of the deed of John A. Cummins.

I.

THE VITAL ERROR OF THE COURT BELOW CONSISTS IN A MISINTERPRETATION OF A DECISION OF THIS COURT AS TO THE SCOPE OF REVIEW OF DECISIONS OF THE SUPREME COURT OF HAWAII.

When the court below approached this cause it did so with the conviction that it was prevented by the decision of this Court in *Waialua v. Christian,* 305 U. S. 91, from making any real examination of the error committed by the Supreme Court of Hawaii. We presented a case to the court below in which the Supreme Court of Hawaii made a clear departure from ordinary principles of law and arrived at the conclusion that an adopted child was "lawful issue" within the meaning of a deed of trust, notwithstanding the fact that the deed of trust was executed long prior to the date of adoption, and indeed, long prior to the enactment of any statute making an adopted child heir of its adoptive parents.

There was thus presented to the court below a case in which the Supreme Court of Hawaii reached a conclusion directly opposed to the overwhelming weight of authority. In fact, this conclusion finds support in no decided case in the whole common law world. Under these circumstances we were clearly entitled to a review by the court below of the merits of this cause and a reversal of the decree appealed from. In place of such review, to which litigants in Hawaii are entitled by Section 128 of the Judicial Code, the lower court, after stating the facts and stating that it was obliged to defer to the decisions of the Supreme Court of Hawaii (citing *Waialua v. Christian,* 305 U. S. 91), dismissed the main point in controversy with a single sentence:

> "To hold, as the Supreme Court did, that the term 'issue', as used in the deed, included an adopted child was not manifest error. The term has often been thus broadly construed." (R. 233).

The authorities cited, as we will show later, had nothing to do with the construction of an instrument executed prior to the enactment of any adoption statute by one who was a stranger to the adoption in question.

Since the fundamental error of the court below springs from a misapplication of the decision of this Court in *Waialua v. Christian,* which led the court below to the conclusion that this Court had commanded blind affirmance of whatever the Supreme Court of Hawaii did, we will briefly discuss the case which the court below felt controlling. In that case the Supreme Court of Hawaii had before it three instruments executed by an incompetent. That court held the instruments voidable and, upon a balance of the equities, that two of them should be upheld and one cancelled with appropriate conditions of cancellation (*Christian v. Waialua,* 33 Haw. 34). On appeal the Circuit Court of Appeals reversed the Hawaiian court and held that all three of the instruments were *null and void* (assuming the grantor's incompetence) and that the Hawaiian court erred in holding them voidable and endeavoring to balance the equities of the parties (*Waialua v. Christian,* 93 Fed. (2d) 603, 610). The holding of the Circuit Court of Appeals, that the deed of an incompetent is void and not voidable, was conceded by that court to be contrary to the great weight of authority (*Waialua v. Christian,* 94 F. (2d) 806).

In other words, the Circuit Court of Appeals in that

litigation went out of its way to reverse the Supreme Court of Hawaii and to adopt the rule of voidity as distinguished from the rule of voidability upon equitable terms, contrary to the almost universal rule of law which the Hawaiian court had followed. Certiorari was applied for and this Court in its opinion reversed the decree of the Circuit Court of Appeals, and in stating the function of that court in reviewing appeals from the Supreme Court of Hawaii, said:

> "It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. * * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii." (305 U. S. 91, 109.)

In the *Waialua v. Christian* litigation the Circuit Court of Appeals undertook to reverse the Supreme Court of Hawaii (which court had followed the overwhelming weight of authority) and endeavored to impose upon Hawaii a so-called "federal rule" to the effect that deeds and contracts of incompetents are void and not voidable. It was almost a foregone conclusion that when this Court granted certiorari in *Waialua v. Christian* the decree of

the Circuit Court of Appeals would be reversed, not because there should be a blind affirmance of every appeal from the Supreme Court of Hawaii, but because the rule adopted by the Supreme Court of Hawaii was in accordance with ordinary legal principles, and the rule endeavored to be imposed upon Hawaii by the Circuit Court of Appeals was itself a clear departure from ordinary legal principles. Accordingly, the decree of the Circuit Court of Appeals was reversed and that of the Supreme Court of Hawaii was affirmed by this Court.

In that case the Supreme Court of Hawaii was right and the Circuit Court of Appeals was wrong in the application of the law to the facts of the case. In the case at bar, however, the Supreme Court of Hawaii was wrong upon the law and should have been reversed.

It is clear that the case which the court below thought required an affirmance of the decree of the Supreme Court of Hawaii in this cause required no such result at all. Because the lower court was reversed by this Court for overruling the Supreme Court of Hawaii when the Supreme Court of Hawaii followed the weight of authority in its decision, is no reason for the lower court to refuse to reverse the Supreme Court of Hawaii in the instant case when that court had made a clear departure from ordinary legal principles contrary to the entire weight of authority. In this cause the Supreme Court of Hawaii arrived at a result which finds support in no decided case, and in a field in which decided cases run into the scores. That court thereby committed a clear departure from ordinary legal principles and manifest error. The error, we submit, should have been reviewed and corrected by the Circuit Court of Appeals.

Notwithstanding the existence of the sharp dissenting opinion in the Hawaiian court, the court below dismissed this cause with a single sentence stating the bald conclusion that the result was not manifest error. "Manifest error" cannot mean the kind of error that an illiterate person might make, such as mistaking a stock certificate for an army discharge. It means an error which judges, trained in the law, will occasionally commit. We say that when a court makes such a clear departure from ordinary legal principles so that its conclusion finds no support in a single decided case in a field of law which has been settled for generations, then that error is manifest error as that phrase has been used by this Court.

We fully agree that the Circuit Court of Appeals should give deference to the decisions of the Supreme Court of Hawaii and should not overturn that court simply because the rule selected by the Hawaiian court is not the one which the Circuit Court of Appeals would have selected had the matter come before it *de novo*, so to speak. This, however, is far different from saying that the Circuit Court of Appeals should shrink from its obligations imposed by Congress to review decisions from the Supreme Court of Hawaii in a case such as this where the Hawaiian court has made a clear departure from the principles of interpretaton that have been settled for generations, and has achieved a manifestly erroneous result.

The remaining portions of this brief will be devoted to a demonstration of the proposition that the Supreme Court of Hawaii did in fact commit manifest error.

II.

AN ADOPTED CHILD IS NOT "ISSUE" OF ITS ADOPTIVE PARENTS.

(a) The word "issue" has had a settled meaning from the earliest days of legal history—it means descendants of the blood.

Ever since the statute *de donis* in the year 1285, the word "issue" has had a settled and accepted meaning by courts and lawyers throughout the common law world. The word of course means the descendants of the blood of a named ancestor.

> *III Holdsworth, A History of English Law*, p. 114.
> *Gray, The Rule Against Perpetuities*, (3d Ed.) Sec. 212.

A detailed discussion of cases would encumber this brief. The authorities are collected in the following notes:

> "The term 'issue' according to the almost universal consensus of opinion, includes descendants of every degree and is to be given that meaning in the absence of explanatory context."
> 2 A.L.R. 930, note; 117 A.L.R. 692, note.

The term does not include adopted children.[1]

The Hawaiian court thought that if the settlor had used the words "heirs of the body" (R. 159) instead of "issue", that would have excluded the respondent who was adopted after his death. The court failed to realize that "issue" and "heirs of the body" are equivalents.

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[1] Morse v. Osborne, 75 N.H. 487; in re Smith's Will, 95 Vt. 97; Ansonia Bank v. Kunkel, 105 Conn. 744; In re Woodcock, 103 Me. 214; Blodgett v. Stowell, 189 Mass. 142; Dulfon v. Keasby, 111 N. J. E. 223; Tankersley v. Davis, 195 N. C. 542.

There is no question as to the class which is to take the property. The question is whether Miss Clark is a member of that class.

The word "issue" should be interpreted in connection with the context in which it was used and the circumstances under which the deed was executed. The fact that under very different circumstances such as the existence of a statute making adopted children heirs, or where the donor was a party to the adoption, the word has been given a broader interpretation, is no reason for giving it a meaning other than its primary meaning in the deed before the court.

Words used in a written instrument are presumed to have been used in their primary and ordinary sense, unless from the whole instrument a contrary intent appears.[2] No such contrary intent appears in the Cummins deed.

The word "issue" was used as a word of purchase, and it is the equivalent of the phrase "heirs of the body" which, of course, would not include an adopted child.

An agreement of adoption, or a statute, could give an adopted child rights of inheritance which it did not before possess, but neither could change the fact as to from what woman the child issued. An act of the legislature could make an adopted child the heir of its adoptive parents, but it could not alter the fact that the child was the issue only of its natural parents. No one can make a child the "issue" of a woman who did not in fact give birth to it.[3]

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[2] 69 C. J. 73; Spreckels v. Spreckels, 21 Haw. 556; Wodehouse v. Robinson, 27 Haw. 462.

[3] Shafer v. Eneu, 54 Pa. St. 304; In re Russell's Estate, 284 Pa. St. 164; Melek v. Curators, etc., 213 Mo. App. 572.

The Hawaiian court, in support of its view that the word "issue", as used in the Cummins deed, should be held to include an adopted child of one of the trustor's children, cited the cases of *Estate of Kamauoha,* 26 Haw. 439; *Sewall v. Roberts,* 115 Mass. 263; and *Tirrell v. Bacon,* 3 Fed. 62. (R. 131, 132.) We think that those cases can readily be distinguished from the case at bar, and that they throw no light on the meaning and intent of the Cummins deed.

In the *Kamauoha* case the question was whether an adopted child could inherit through his adoptive mother the intestate estate of his mother's father. The statute of descent and the adoption statute of 1905, as later amended, being in *pari materia,* were read and construed together, and it was held that the word "issue" in the statute of descent would include an adopted child. The court pointed out (p. 442) that the question was one purely of statutory construction.

In *Sewall v. Roberts* there were two important factors which are not present in the case at bar, namely, in that case the child had been adopted by the settlor himself; and under the provisions of the statute then in force the child had the right of inheritance as his heir. The decision shows that the case was made to turn upon the exception contained in the adoption statute then in force, no counterpart of which was ever in force in Hawaii.

In *Tirrell v. Bacon,* the court, in holding that the adopted son would take as the child of his adoptive father, followed *Sewall v. Roberts* which was regarded as turning on the Massachusetts adoption statute of 1851. But the provision in the will in favor of the "lawful issue of any deceased child of such child" never came into operation

and was not involved, so that the court was not called upo
nor did it attempt to determine the effect of the phras
"lawful issue".

None of the reasoning of the courts in those cases ha
any logical application to the case at bar. The same is t
be said of the cases referred to in the opinion of the Cir
cuit Court of Appeals.

The cases of *Hartwell v. Tefft,* 19 R. I. 644, and *In r*
Olney, 27 R. I. 495, were cited.

Hartwell v. Tefft, improperly as we contend, drew upo
the adoption statute in interpreting the will. The deci
sion followed *Sewall v. Roberts,* supra, which involved
similar statute. The reasoning was that since the propert
in the hands of the adoptive parent had not been limite
to "heirs of the body", the adopted child was an heir an
therefore would take as "issue" under the will. But th
will in that case showed that the testator intended t
extend his bounty to others than his own blood.

The case of *In re Olney,* as the decision shows (p. 957
was "ruled by Hartwell v. Tefft."

Hartwell v. Tefft was explained and its authority que
tioned in the later case of *Smith v. Bradford,* 51 R. I. 28

The case of *In re Newman,* 75 Cal. 213 was cited.

That case merely involved the right of an adopted chi
to inherit the intestate estate of its adoptive parent, and th
court pointed out (p. 219) that in the statute of desce
the words "issue" and "children" were used as synonym
The case of *Estate of Wardell,* 57 Cal. 484 was there cite
In that case the court very properly pointed out that
word may have a statutory meaning different from i
common law meaning. We rely on that distinction her

In the *Kamauoha* and *Newman* cases the courts were considering the statutory meaning of the word "issue" i.e., the sense in which the word was used by the legislature, whereas in the case at bar we are dealing with the common law meaning of the word, i.e., the sense in which it was used by the trustor.

The case of *In re Holden's Trust,* 207 Minn. 211, involved the right of the adopted son of the adopted son of the testatrix to take under a gift to "lawful issue". The court invoked erroneously, as we contend, the statute of descent and the adoption statute and held that although the statutory meaning of the word "issue" was "lineal descendants" (and therefore declaratory of the common law) the provision of the will included the adopted child. The reasoning obviously was faulty. It entirely overlooked the fact that whether a child is the issue of a certain woman or couple cannot be altered by the existence or enactment of an adoption statute. It is true that where there is a gift to "heirs" the statute of descent must be resorted to because there is no other way to ascertain who the heirs were, but that does not apply to the ascertainment of the meaning of the word "issue". The principal basis for the conclusion reached appears to have been that because the adoption statute conferred the right of inheritance, therefore the testatrix must have intended to include an adopted child within the term "issue". But the circumstances there were very different from what they are here, in that no children had been adopted in the Cummins family, nor was there a statute in Hawaii making adopted children heirs of their adoptive parents.

An examination of the cases cited in the decisions of the Hawaiian court and the Circuit Court of Appeals will

show that none of them give any real support for the conclusion reached in this case, and that they have been misapplied.

The right of an adopted child to inherit intestate property is entirely separate and distinct from its right to take under a deed or will. Those rights depend on different bases.

There was no circumstance in connection with the execution of the deed which would indicate that Mr. Cummins contemplated that any of his children would adopt a child, much less that if one should be adopted it would be adopted as an heir pursuant to the then existing law of Hawaii. The only reasonable inference, we submit, is that by the use of the word "issue", instead of the word "heirs", he intended to exclude adopted children should any there be.

The decision of the Hawaiian court was entirely devoid of logical grounds and based on obviously faulty reasoning. It is without the support of a single decided case involving similar circumstances and is contrary to the entire trend of decisions in similar cases, and it failed to apply the ordinary and applicable common law principle of interpretation.

It was therefore a manifestly erroneous decision within the meaning of the decision in *Waialua v. Christian,* and one which called for a reversal at the hands of the Circuit Court of Appeals.

(b) Since the settlor was a stranger to the adoption, the Hawaiian court committed manifest error in holding respondent Clark "lawful issue" within the meaning of the trust deed.

The trust in question took effect forthwith on its execution in 1896. At that date no statute in Hawaii made an adopted child the heir of his adoptive parents. The settlor died before respondent Clark was born, (R. 211-213). The settlor under the trust instrument made provision for himself and his wife for life, for his named children for life, and then followed the language which the lower court has held includes respondent Clark:

> "and upon the death of the last surviving child of the party of the first and second part (the settlor and his wife) the entire trust estate * * * shall thereupon vest in and forthwith be transferred and conveyed, free and clear of this trust, to the lawful issue of the children aforesaid then surviving, such issue to take by right of representation." (R. 37.)

There are many cases in the reports which deal with the right of an adopted child to take under a deed or will.

Overwhelming authority is to the effect that where the child was the adopted child of the donor himself, the presumption is in favor of an intent that the child is to take under a gift to the donor's children, but the contrary presumption prevails where, as here, the donor was a stranger to the adoption; that where a child was adopted after the instrument was executed, the presumption is against an intent that it was intended to be included in a gift to "issue" or "children"; and that the fact that the common law has been departed from by the enactment of a statute recognizing adoptions and making adopted children heirs of the adoptive parents, will not justify a holding that an

adopted child will take, unless the instrument shows a clear intent that it was to be included.[4]

In construing a deed or will with respect to the right of an adopted child to take, the question is not as to the right of the child to inherit under a statute of descent or an adoption statute, but is as to the intent of the donor as expressed in the instrument.

1 Am. Jur. p. 665.

The local court said, in effect, (R. 139) that in a common law jurisdiction "upon the presumption of blood preference" the word "issue" would not include an adopted child, but held that as the adoption of children was recognized by an ancient Hawaiian custom and because John A. Cummins was of part Hawaiian blood, it being reasonable to presume that he had absorbed the atmosphere of the ancient custom and was aware of its recognition by the Hawaiian Supreme Court, the word "issue" in his deed should be construed to include an adopted child.

That reasoning, we contend, was fallacious in several respects.

The fact that the Hawaiian custom recognized adoption in various forms, one with the right of inheritance and

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[4] Ahlemeyer v. Miller, 102 N.J.E. 54; Dulfon v Keasby, 111 N.J.E. 223; Stout v. Cook, 77 N.J.E. 153 Wilder v. Wilder, 116 Me. 389; Middletown Trust Co. v Gaffey, 96 Conn. 61; Smith v. Thomas, 317 Ill. 150; Russell v. Musson, 240 Mich. 631; Albright v. Albright, 11 Oh. St. 668; Lichter v. Thiers, 139 Wis. 481; Parker v Carpenter, 77 N.H. 407; In re Puterbaugh's Estate, 26 Pa. St. 235; Rodgers v. Miller, 43 Oh. App. 198; Melel v. Curators, etc., 213 Mo. App. 572.

others without, throws no light on the interpretation of the deed.

Hawaiian law, like the common law, favored the blood unless a contrary intention was manifested. Where, pursuant to Hawaiian law, a child was adopted as an heir, an intent to depart from the "blood preference" was expressly shown.

But that has no legitimate bearing on the interpretation of this deed.

To assume, without evidence, that Mr. Cummins was imbued with the Hawaiian custom of adoption in face of the fact that there had been no adoption in his family nor anything to draw his attention to the subject of adoption when he executed the deed, was pure speculation and an imaginative assumption that Mr. Cummins had a predilection for the Hawaiian side of his nature rather than the Anglo-Saxon side.

The province of the court is not to conjecture what the trustor's intention was and then read it into the deed (*Lathrop v. Merrill,* 207 Mass. 6, 10), and to do so is to commit reversible error.

The decision overlooked the obvious inference that in the deed the word "issue", which would not include children by adoption, was advisedly used in contradistinction to the word "heirs" which would have included them.

(c) The Hawaiian custom concerning the adoption of children did not affect the interpretation of the deed.

There is no question as to what the law concerning adoption in Hawaii was or is. The point we make is that the law of adoption has nothing to do with the interpretation of the word "issue" as used in this deed, and the deci-

sion which made the interpretation of the word turn upo
the law of adoption, instead of upon the fact as to wha
woman Margaret Mamo Clark is the issue of, was obvi
ously erroneous.

The common law (with certain exceptions, includin
Hawaiian usage) was adopted by statute in 1892.

Revised Laws of Hawaii 1935, Sec. 1.

The Hawaiian custom as to the adoption of childre
affected only the relations between the child and the adop
tive parents, and in that respect it did not depart from th
common law so far as do the adoption statutes of thos
states in which the state courts have held that the existenc
of a statute making children heirs of the adoptive paren
would not affect the interpretation of a will or trust dee

No such statute was enacted in Hawaii till 1905. Th
right of adopted children to inherit from their natura
parents was then abrogated and they were made heirs o
their adoptive parents.

Revised Laws of Hawaii 1935, Sec. 4527.

Prior to that enactment the adoption of children reste
upon contract between the natural parents and the adop
tive parents for the good of the child. But the child di
not acquire the right to inherit from the adoptive paren
unless it was expressly adopted as an heir.

Estate of Nakuapa, 3 Haw. 342, 346, 347.
Estate of Wilhelm, 13 Haw. 206, 211.

That adoption without the right to inherit was the usu
Hawaiian practice, is shown by the early decisions.[5]

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[5] Mellish v. Bal, 3 Haw. 123; Estate of Maughan,
Haw. 262; Estate of Nakuapa, 3 Haw. 346, 410; Wei S
v. Young Sheong, 3 Haw. 489; Estate of Wilhelm,
Haw. 206.

That practice constituting a foster relation was not peculiar to Hawaii, nor did it trench upon the common law.

The discussion in the majority and dissenting opinions of the Hawaiian court (R. 155, 156, 169) as to the meaning of Hawaiian words is not at all enlightening. The Cummins deed did not use the word "adopted" or "adoption"; consequently the Hawaiian equivalent of those words is entirely irrelevant to the decision of the fundamental question here involved. If the deed had been drawn in the Hawaiian language the question might have arisen as to what the trustor meant by the Hawaiian words he had used, but that is not the situation here.

CONCLUSION

We realize the heavy burden that rests upon the Bar to avoid a needless drain upon the time of this Court in applying for a certiorari in the ordinary case. We are not asking that the writ should issue in this case for the reason that the lower court has made what we consider an erroneous choice of two or more permissible rules of law.

The lower court, without the slightest justification in reason, logic or authorities, has affirmed the decree of the Hawaiian court which reached a result contrary to the overwhelming weight of authority in a field of law which has been settled for generations.

The excuse of the lower court for its failure to give any real review in the instant cause is the decision of this Court in *Waialua v. Christian,* 305 U. S. 91. This conclusion results from a misunderstanding and a misapplication of the decision of this Court in the case cited. If the decision below is to stand no person in Hawaii will ever know

whether the Circuit Court of Appeals will review any decision of the Supreme Court of Hawaii on a common law topic. The rule as to deference to the decisions of the highest Hawaiian court was never intended, we submit, as a cliché whereby the Circuit Court of Appeals could shirk its duty of review imposed upon it by Congress.

In this cause we are dealing with a branch of the law which calls "in conspicuous measure for certainty and order," (*Cardozo, The Growth of the Law,* 81, 82). Courts and lawyers for generations have interpreted the words "lawful issue" in deeds and wills to mean a very definite thing, and that is, the descendants of the blood of the named ancestor. To give those words a different meaning than that upon which men have relied, will result in litigation and uncertainty and injustice in a field in which certainty is of prime importance. The decision below leaves the jurisprudence of an entire people, the Territory of Hawaii, in chaos.

We respectfully submit that this Court in the exercise of its supervisory jurisdiction should grant certiorari in this case, and upon hearing of the cause reverse the decree below.

DATED: Honolulu, Hawaii, February 6, 1941.

Respectfully submitted,

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